Commonwealth of Massachusetts

Appeals Court

Suffolk County **2017 Sitting**

No. 2017-P-0126

W. Robert Allison
Plaintiff/Appellant
v.

Elof Eriksson & others
Defendants/Appellees

On Appeal From A Judgment Of The Superior Court Of Suffolk County

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Brief For The Plaintiff/Appellant

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Table of Contents

Table of Authorities

Issue Presented

Whether, having found that the majority member of an LLC breached his fiduciary duty to the minority member by orchestrating a clandestine merger for the purpose of freezing him out of his interest in the company, the trial court should have rescinded the merger instead of leaving the minority member with a much reduced interest in the reconstituted company.

Statement of the Case

In January of 2000, the plaintiff W. Robert Allison and the defendant Elof Eriksson formed Applied Tissue Technologies LLC (ATT), a limited liability company organized under the laws of Massachusetts. On May 22, 2013, Allison filed a verified civil complaint and jury demand in the Suffolk Superior Court Business Litigation Section against Eriksson, Gundrun Eriksson (both individually and as Trustee of the Elof Eriksson Irrevocable Trust-2003), and Karl Proppe (both individually and as Trustee of the Elof Eriksson Irrevocable Trust-2003). The complaint raised claims of breach of contract (Count I), intentional interference with advantageous business relations (Count II), breach of fiduciary duty (Count III), and civil conspiracy (Count IV), and also sought declaratory judgment and permanent injunctive relief (Count V). Accompanying his complaint was a motion for a preliminary injunction. The defendants filed an opposition to the motion on June 28, 2013. On July 3, 2013, a judge of the Superior Court (Billings, J.) issued an interim order accepting the terms of a standstill agreement. On July 16, 2016, Judge Billings allowed the motion in part and denied it in part. [R. App. 4, 8-200].

The defendants filed an answer and affirmative defenses on August 14, 2013. [R. App. 4]. Thereafter,

the parties filed and the court considered a number of motions not relevant to this appeal. [R. App. 4-7].

In June of 2015, the parties filed cross-motions for summary judgment. On August 11, 2015, the court (Kaplan, J.) issued a memorandum of decision and order denying the plaintiff's motion for summary judgment and denying in part and allowing in part the defendants' motion for summary judgment. More specifically, the court dismissed so much of Count I as asserted claims against Karl Proppe or Gudrun Eriksson; it dismissed Count II in its entirety; it dismissed Count III as to Proppe and Gudrun Eriksson, individually (but not as trustees); and it dismissed Count IV as to the Eriksson Trust, Gudrun Eriksson individually and as trustee, and Karl Proppe in his capacity as Trustee (but not individually). The court otherwise denied the motion. [R. App. 5, 221-283].

On August 18, 2015, the court (Leibensperger, J.) denied the defendants' motion to amend their answer and jury demand by asserting a counterclaim, but otherwise allowed their request for leave to amend their answer and affirmative defenses. The defendants filed their amended answer on August 31, 2015. [R. App. 5, 201-220].

A jury-waived trial took place before Judge Kaplan on April 4-7, 2016. [R. App. 6]. Judge Kaplan

issued findings of fact, rulings of law and an order for entry of judgment on June 30, 2016. [R. App. 6-7, 284-307].

The parties filed a joint motion to clarify the judgment on or about August 22, 2016. On August 29, 2016, the court issued an order clarifying the initial order. Final judgment entered on September 14, 2016. Allison filed a notice of appeal on October 12, 2016. Eriksson filed a notice of cross-appeal on October 17, 2016. [R. App. 7].

This Court docketed the appeal on January 31, 2017.

Statement of Facts

For purposes of this appeal, Allison will rely on the findings of facts entered by the trial court in its June 30, 2016 decision referenced above. The recited facts are as follows:

> The plaintiff, W. Robert Allison, is a graduate of Harvard College and Stanford University Law School. He practiced law in Boston for approximately 30 years, specializing in business and real estate matters. In 1997, he left the practice of law to become president of a software company, but lost that position two years later when the company was sold. In 1999, Allison was looking for another business opportunity, as he did not wish to return to the practice of law.
>
> The defendant, Elof Eriksson, M.D., Ph.D., was, until recently, Chief of the Division of Plastic Surgery at Brigham and Women's Hospital (BWH). He trained both in Sweden, where he was born, and in the United States, joining the BWH staff in 1986. He is listed as the inventor on several patents, including of relevance to this case, patents relating to the treatment of wounds.
>
> Allison and Eriksson first met in 1995, when Eriksson was referred to Allison as an attorney who could represent him in connection with a business opportunity. They met briefly, but Eriksson decided not to pursue the opportunity, and Allison never sent Eriksson [an] engagement letter or a bill for his time.
>
> Allison and Eriksson next encountered one another in 1999. Eriksson wanted to found a business based on intellectual property (IP) having to do with the treatment of wounds that he patented while at BWH and had purchased from BWH for approximately $150,000. He contacted Allison who explained that he was no longer practicing law, but was himself looking for a business opportunity. After discussions, the two agreed that they would form ATT together. Allison contributed $15,000 and Eriksson $45,000 and the IP; in 2002 ATT

reimbursed Eriksson the sum he had paid to BHW for the IP. Eriksson received 75% of the membership interests (or points) in ATT and Allison 25%.

Allison formed ATT by filing its Certificate of Organization with the Massachusetts Secretary of State on January 28, 2000. He also prepared ATT's operating agreement which was signed by him and Eriksson on that same date. Allison used a very simple form of operating agreement as the template, which he obtained from the internet.

The parties dispute whether Allison was acting as Eriksson's attorney in connection with the formation of ATT. The court finds that he was not. The court finds that Allison had decided before he and Eriksson first discussed ATT that he would no longer practice law. Eriksson may not have fully appreciated the distinction between managing the legal affairs of the LLC and acting as lawyer either for ATT or Eriksson or both; however, the court finds that no attorney/client relationship was established between Allison and Eriksson. In any event, Allison and Eriksson showed the operating agreement to attorney Sam Mawn-Mahlau, then with the firm of Edwards & Angell LLP, who found it acceptable for a company just starting-up. Mawn-Mahlau was an attorney with whom Eriksson had worked while at BWH. Mawn-Mahlau went on to provide legal services for ATT through 2011. The court also notes that no material disputed issue of law or fact turns on the question of whether Allison was representing Eriksson.

Of relevance to this action, the original operating agreement contained the following provisions. Eriksson and Allison were the only two members of ATT, and the company was to be managed by its members who voted based on their respective membership interests; there were no provisions either for managers nor a super majority vote for particular matters. However, additional capital contributions required the unanimous consent of all members. Eriksson argues that this provision was unfair to him. The court finds that such a provision is not uncommon in a joint venture involving two participants who agree that they must both consent to certain, fundamental business

changes, even though they do not have equal interests in the profit and loss of the enterprise.

Allison became the president and chief executive officer of ATT, and was responsible for managing the business. ATT rented office space in Newton, where Allison worked. The parties agreed that Allison would receive compensation of $225,000 a year to run the day-to-day affairs of the company and Eriksson $100,000 a year as a consulting fee.[1]

In September, 2000, ATT entered into an agreement to license certain of ATT's IP with a third-party which generated $3.9 million in licensing and royalty revenues before it ended in 2005. During this time, substantial work was done on new technology and new patent applications were filed. The law firm Quarles and Brady represented ATT in connection with intellectual property matters. The parties began to take their salaries sometime in 2001. Additionally, during these years substantial distributions of cash were also made to each.[2] At some point, ATT hired a full time employee, Christian Baker. Baker had worked for Eriksson at BWH as an operating room technician. In 2004, he was added as a member of ATT, receiving a 2% of the points from Allison and Eriksson, who each transferred interests to Baker according to their 25%/75% split.

In late 2003, Allison and Eriksson decided to distribute some of their points in ATT to trusts established for the benefit of family members as an estate planning device. Mawn-Mahlau and one of

[1] At some point, the parties agreed to reduce their salaries to $100,000 and $60,000 a year, respectively. The date these salaries were reduced is not clear.

[2] Between 2000 and 2005, Allison received $1,068,427 in distributions and salary from ATT. Allison testified that some of this was deferred compensation for a period before ATT had cash to pay him, but there were no documents reflecting a distinction between distributions and payment of deferred salary, such as a W-2, introduced in evidence, and the court doubts that the parties paid close attention to this issue.

his partners provided the legal work for this task. Allison and his son were the trustees of a Trust for the benefit of Allison's family (the Allison Trust) and Gudrun Eriksson (Eriksson's wife) and Dr. Karl Proppe, a physician and close friend of Eriksson, were the trustees of the Trust for the benefit of Eriksson's family (the Eriksson Trust).

In connection with the transfer of these points to the Trusts, Mawn-Mahlau prepared a more lengthy and sophisticated "First Amended and Restated Operating Agreement" (the Operating Agreement) which the parties executed at the time the Trusts were admitted as members. Eriksson paid little attention to the preparation of the Operating Agreement, which he understood generally to carry-forward the arrangements agreed to in the original operating agreement. The Operating Agreement created the position of Manager who was to be elected by the Voting Members and provide the day-to-day management of ATT's affairs; Allison became the Manager. It also defined the term "Original Members" to be Eriksson and Allison. The Original Members had to agree to the addition of any new members of ATT, who could be either voting or non-voting. Notably, any change to the Operating Agreement also required the consent of the Original Members, and no change in the Operating Agreement that had the effect of reducing any member's interest in ATT or interest in distributions from a sale of its assets or cash flow could be made without the consent of the affected member. This provision therefore served to prevent the dilution of any member's interest in ATT, without that member's consent. This created somewhat more protection for minority members than had previously existed; however, with respect to Allison, it generally carried forward the provision in the original operating agreement that both he and Eriksson had to agree to any further capital contributions. The Operating Agreement set the membership vote required for most significant business decisions at 60%, but as Eriksson and his family Trust continued to hold 75% of the points, this was not a significant change.

By September, 2005, ATT was no longer generating revenues and Allison and Eriksson agreed that ATT would stop paying their salaries. The parties are in sharp dispute as to whether they agreed that deferred salaries would accrue, to be paid at a later date when ATT was financially able to pay them, or simply discontinued, to be resumed at some time in the future. Their testimony is consistent that the decision was reached in a brief conversation and was not documented in any writing. The court finds that Eriksson and Allison may have different views as to exactly what was agreed upon, but also finds that there was no meeting of the minds that salaries would be deferred to some indefinite date in the future. There is no evidence that the topic was discussed again until late 2011. Further, ATT's financial records, maintained by Allison, never reflected deferred salaries as either a contingent or fixed liability.

ATT continued to generate very little revenue. In 2007, it could no long afford to pay Baker, and he was terminated. A dispute arose between Allison and Eriksson concerning the terms of Baker's departure. While the parties disagree concerning the facts underlying Baker's termination, they are not material to the outcome of this case. It is sufficient to state that Allison and Eriksson resolved their dispute concerning Baker's termination by Allison's transfer of 2% of his points to Eriksson. After that transfer, ATT's points were held by its members in these percentages: Eriksson- 55.5%; Eriksson Trust- 20%; Allison- 14.66%; Allison Trust- 7.84%; and Baker - 2%.

During the period, 2006 to 2008, Eriksson lent ATT $200,000 to cover operating expenses, which was later repaid to him with interest accrued at 15%. In or around this period, Allison looked for work outside of ATT, which, as noted above, was not paying him, but found only a few weeks of work in a temporary placement. He did not seek work as a lawyer. The parties are in dispute concerning how many hours a week Allison worked on ATT's affairs between 2005 and 2011. There is insufficient evidence in the record from which the

court can make any finding on this. It appears likely that during some weeks Allison devoted substantial time to ATT, and on other occasions it did not require very much of his attention.

In December, 2008, ATT entered into an asset purchase agreement with Wright Medical Technology, Inc. (Wright) pursuant to which ATT sold to Wright its interests in a wound care technology that the parties refer to as the XPansion product or kits. The purchase price was effectively $1,000,000, plus additional royalties to be paid ATT as Wright sold XPansion kits. Unfortunately, Wright did not sell very many kits and the royalty stream from this product was meager.

In March, 2010, Dr. Karl Proppe became the Chief Executive Officer of ATT. Allison relinquished that position, but continued on as President and Manager of ATT. How the duties of each would differ is not clear, but Proppe was intended to lead ATT in the development of a negative pressure wound treatment technology. Proppe did not make a financial contribution to ATT and did not receive any points. Allison continued to be responsible for the general management of ATT's business.

In May, 2011, Wright notified ATT that it was exiting the wound care business and would no longer be selling XPansion kits. Thereafter, Allison led negotiations with Wright for the reacquisition of Xpansion; he received legal assistance from Mawn-Mahlau. The repurchase agreement was finalized in September, 2011. Under its terms, ATT was to pay Wright a 6% royalty on sales, capped at $1,000,000, and to purchase the 4,445 XPansion kits that were then in Wright's inventory at a price of just over $100 each over the next year, a $450,000 obligation. Allison attempted to find third-party sales representatives to market XPansion, but was unsuccessful. A decision was reached that ATT would hire an experienced sales person to market XPansion.

During the summer and fall of 2011, Allison prepared revenue and expense projections for ATT, but became frustrated by Eriksson's failure to

discuss and comment upon them. The projections, however, were not based on any market research concerning the likely sales of XPansion, but rather simply identified the revenue that would be generated if certain numbers of kits were sold at various prices.

On November 15, 2011, Allison sent a letter to Eriksson and Proppe stating that he was resigning as Manager and President of ATT. He was willing to provide services to ATT on a part time basis for a fee of $50 an hour. On December 19, 2011, Allison, Eriksson, and Proppe met at what they described as a "members meeting." Among many other matters that were discussed, Allison asserted that ATT owed him his deferred salary at the rate of $100,000 annually since November, 2005. Eriksson responded that they had not agreed to defer compensation but rather to discontinue salary, until ATT could afford to start paying it again, and Allison had not worked at ATT full time since 2005. Everyone understood that the company needed to raise capital, but disagreed on how to accomplish that. Allison agreed that he would provide some services to ATT without demanding compensation, and assist in transitioning work to Eriksson's wife who would assist with bookkeeping and a new marketing director.

Neil Webber was hired as vice president of sales and marketing in December, 2011, to begin in January, 2012; he was initially to focus on selling the Xpansion kits. His annual salary was $200,000. He was not successful in selling the product.

The ATT members met again on January 25, 2012. The question of whether Allison was owed deferred compensation was discussed, but the parties were unable to resolve their dispute. The need for additional capital was the principal topic of discussion, as ATT was nearly out of cash. Eriksson stated that he was no longer willing to loan money to the company as he had in the past, but was willing to make a further investment for additional equity. Allison responded that he was unwilling to have his interest diluted, unless the investment came from an outside investor. No one

was aware of any potential outside investor, and generally agreed that ATT was at least a year away from being able to attract any outside investors. Eriksson asserted that the Operating Agreement needed to be amended, presumably so that he could invest equity over Allison's objection, but was non-specific concerning what the amendments should be.

These issues continued to be discussed and [were] the subject of email exchanges over the next two months. Allison's position was firm that he would not (and could not afford to) invest in the company and would not agree to have his interest diluted by a further equity investment from Eriksson. At one point, Eriksson specifically offered to invest $600,000, if Allison would invest $200,000, but Allison rejected this proposal. He also would not agree to use personal assets to secure a bank loan to ATT. Eriksson was frustrated by Allison's position that he would no longer serve as the President and Manager of ATT, was unwilling to commit personal assets to the firm, and insisted that his ownership interest not be diluted (except by an outside investor that no one believed would materialize). At one point, Eriksson suggested that ATT would have to be dissolved.

Eriksson's daughter, Emma Eriksson Broomhead, was then an associate at the Waltham office of the law firm, Gunderson Dettmer, LLP. Broomhead arranged a meeting for her father with a senior attorney at Gunderson, Gary Schall. The three met on February 9, 2012. Eriksson explained his concerns regarding ATT. Various approaches were considered, including Eriksson buying out Allison or a purchase of all the assets of ATT by another company. It was decided that an appraisal of ATT was necessary. Schall and Gunderson were retained to represent ATT; Proppe signed the engagement letters.[3] No one told Allison that Schall had been retained; Schall

[3] In April, 2012, Schall moved his practice to WilmerHale, LLP. A new engagement letter was signed and Schall continued to represent ATT/Eriksson as he had while at Gunderson.

also did not contact Mawn-Mahlau, who had been outside counsel to ATT for over ten years. The court finds that Eriksson, Proppe and Schall all specifically chose not to let Allison know of Schall's engagement.

At Schall's recommendation, ATT engaged Orchard Partners, Inc. to do the appraisal. Eriksson told Allison about the appraisal, but not about Schall's involvement or the actual purpose for it. Orchard Partners did not meet with Allison in connection with the engagement. The appraisal was issued on April 16, 2012. It was curiously principally based on a discounted cash flow valuation, although ATT had not generated any significant income in the last few years, and its only significant asset[] was its IP. Orchard Partners apparently did not consult with anyone who could value the IP. Orchard Partners concluded that 100% of the equity of ATT had a value of $239,000, but only if $620,000 of "funding" was provided to ATT. According to Orchard Partners, in the absence of that funding, ATT's value was $0. Or stated differently, someone would have to commit $620,000 to ATT and then the company would be worth $239,000.

In April, 2016, Eriksson lent $26,000 to ATT, as it was out of cash and unable to pay its bills, including Webber's salary.

In May, 2012, Schall and Eriksson began to focus on two approaches to deal with Allison. Eriksson would make an offer to purchase Allison's and the Allison Trust's interests in ATT based on the Orchard Partners appraisal. If he refused the offer, Eriksson would form ATT Delaware, which would have a new operating agreement that would accomplish Eriksson's goals. Eriksson would then vote his points in ATT to cause ATT merge with and into ATT Delaware. Schall reasoned that because under G.L. c. 156C, § 60 a merger can be approved by members owning more than 50% of the unreturned capital contributions of a limited liability company, Eriksson could cause the merger to occur without Allison's involvement and this merger would therefore not constitute a breach of

Eriksson's fiduciary duties to Allison, regardless of the terms of new operating agreement.

On May 6, 2012, Eriksson offered to purchase Allison's and the Allison Trust's points in ATT for $53,775, *i.e.*, 22.5% of the $239,000 valuation. The offer also required Allison to release his claims for deferred compensation. On May 8, 2016, Allison rejected the offer.

From May 5 to 21, 2012, Proppe was in Norway. Upon his return, Eriksson explained Schall's merger plan to him and recommended it. After several phone calls, Proppe agreed to help implement it. ATT Delaware was formed on May 25, 2012, when its Certificate of Formation was filed in the Office of the Secretary of State of Delaware. The Agreement and Plan of Merger was executed by Proppe as "Manager and Chief Executive Officer" of each of ATT and ATT Delaware on May 29, 2012. That evening Eriksson and Proppe met with Allison and informed him of the transaction. He had no prior notice of it, or Schall's representation of ATT. The Agreement of Merger was filed in the Massachusetts Secretary of State's office on June 1, 2012.

There are significant differences between the rights of members under the ATT Operating Agreement and the ATT Delaware Amended and Restated Limited Liability Operating Agreement (the ATT Delaware Agreement). The ATT Delaware Agreement creates a new class of preferred shares, with a liquidation preference over the common shares. The power to manage ATT Delaware is expressly given to its Board, the members have no rights other than selecting directors. The Board is elected by the written consent of the holders of a majority of the shares of the company. The members have no fiduciary duty to the company or to each other, but rather only the duties specifically expressed in the ATT Delaware Agreement, all other duties or restrictions on self-interested actions are waived to the extent permitted by Delaware law. For example, the directors and members may compete with ATT Delaware by, among other things, owning or working for a business engaged in the same or similar

activities or lines of business as ATT Delaware. Further, no member of ATT Delaware has any right of access to the books or records or to receive any information about the business or affairs of ATT Delaware, unless the Board decides to grant such access. The Board may also pick and choose which members may receive information and what information to disclose to them. There appears to be no restrictions on the Board's right to withhold information, except as it may be necessary to the preparation of a member's tax return. Also, no membership interest may be transferred without the approval of the Board, even to family members.

On June 17, 2012, Allison wrote to Eriksson and Proppe challenging the propriety of these transactions. On June 18, 2012, Eriksson signed subscription agreements pursuant to which he purchased $250,000 of preferred shares in ATT Delaware. Allison was given the opportunity to purchase sufficient preferred shares to maintain his percentage ownership interest in ATT Delaware, but declined. In or about July, Allison was denied further access to ATT's offices, which by then had become the offices of ATT Delaware. Allison pointed out that, the subscription agreements required a purchaser to attest that he is an "'accredited investor' as defined in Rule 501(a) of the Securities Act," and he doubted that he could meet the financial requirements for that standard; although, the court finds that he would not have invested even if he could meet the accredited investor test.

Over the next 18 months, Eriksson purchased additional preferred shares such that his aggregate purchases (including the initial $250,000 investment) as of January 14, 2014 was $923,536. Although, Allison was given the opportunity to purchase preferred shares on each occasion that Eriksson did, he purchased none. In consequence, by that date, Allison's and the Allison Trust's ownership interest in ATT had been reduced to 3.32%. In the event of liquidation, his interests were subordinated to the preferred shareholders'.

In August, 2012, Allison, Eriksson, Proppe, and Schall met in an attempt to resolve Allison's claim that Eriksson had breached his fiduciary duty to him by authorizing the merger and his subsequent purchase of preferred shares. The meeting was very contentious with accusations of bad behavior being cast at one another by Allison and Eriksson.[4] At one point Schall asked Allison if he would rather have a small percentage of an ongoing business or 22.5% of a defunct one, and Allison responded a larger percentage of the failed business.

Thereafter, Allison met with Proppe and Schall (but not with Eriksson as Allison and Eriksson could not engage in useful conversation) two or three more times in September and October, 2012 in an attempt to reach a settlement. There appears to have been a willingness on the part of Eriksson to amend some of the provisions in the ATT Delaware Agreement to provide Allison with access to information and the opportunity to consult with Eriksson and Proppe on decisions affecting ATT Delaware, as well as a right of first refusal on additional investments or sale of shares. However, there was no willingness to reclassify Eriksson's investments as debt and restore Allison's percentage ownership in the company. Allison, made no offer in compromise that did not involve the return of his equity without risk of dilution except on the investment of a third-party. This action was, however, not filed until May, 2013.

In July, 2012, Michael Broomhead, Emma Eriksson Broomhead's husband, began helping out at ATT on a part time basis. He became CEO/CFO in November, 2012. By that time, Weber had been terminated. Since then he has been the only full time employee of ATT Delaware. Broomhead has an undergraduate degree in accounting and an MBA. He held management positions at other companies before joining ATT Delaware.

[4] In particular, Eriksson believed that Allison had used his superior knowledge of the law to include in the operating agreement provisions that were unfair to him.

> In 2013, the company generated $18,800 in revenue. In 2014, it generated $823,000 of revenue, most of this was from the sale of the Xpansion kits and an exclusive license to market them in the Western Hemisphere to a large medical equipment company. The company still operated at a loss during that year, as the cost of those goods included the payment to Wright medical as well as the costs of repackaging the product. Broomhead has unsuccessfully been trying to find a distributor for the kits in the Eastern Hemisphere. In 2015, ATT generated $461,033, almost all of that was from grants. Broomhead believes that the company will have an operating loss of $150,000 in 2016, which Eriksson has agreed to fund.
>
> Much of the company's expenses are associated with work on new intellectual property and the legal fees associated with patent applications. Since 2012, it has filed 21 patent applications; 11 patents have been granted, 9 of those based on applications filed after 2012.
>
> Broomhead has been actively looking for investors or partners for ATT. He believes that he has contacted 78 firms who were either potential investors or larger health care companies that might have an interest in ATT Delaware's products, without success. At present, he is unaware of any potential investor or partner for ATT. Broomhead has invested $10,000 in ATT Delaware and Proppe $30,000.

[R. App. 285-298].

Argument

I. Having Found That Eriksson Breached His Fiduciary Duty To Allison By Orchestrating A Clandestine Merger For The Purpose Of Freezing Him Out Of His Interest In ATT, The Trial Court Should Have Rescinded The Merger Instead Of Leaving Allison With A Much Reduced Interest In The Reconstituted Company

The trial judge correctly found that "Eriksson certainly did not act with utmost good faith toward Allison when he surreptitiously retained Schall to represent ATT and then adopted Schall's advice to merge ATT into ATT Delaware". [R. App. 299 (Decision p. 16)]. By undertaking this clandestine "freeze-out", Eriksson in effect "unilaterally amend[ed] the operating agreement in a manner that not only permitted him to invest equity in ATT without Allison's consent, thereby diluting Allison's interests, but also deprived Allison of all minority rights that Delaware law permitted the parties to an operating agreement to eliminate by contract." [R. App. 299 (Decision p. 16)]. The trial court further found "that even though the approach he took to solving his predicament was on the advice of his attorney, it nonetheless constituted a breach of fiduciary duty." [R. App. 300 (Decision p. 17)]. In the trial court, Allison asked that the merger be set aside and that Eriksson's investment in the company be treated as a loan pursuant to the terms of the Operating Agreement. The court declined to adopt that

remedy. Instead the court "grossed up" the interests of Allison and his trust from 3.2% to 5%. This equity interest would not be subject to dilution by Eriksson and his related members, but would be diluted by any outside investor. The court also ordered Eriksson to amend the ATT Delaware Agreement to provide Allison with limited rights to company information. As a result, the order leaves Allison with a fraction of his former percentage ownership and no meaningful voice in the reconstituted company. Notwithstanding Eriksson's appalling breach of his fiduciary duties, the court merely slapped him on the wrist, allowing him to benefit greatly from his wrongful conduct. The trial court's decision should be set aside, and Allison should receive the remedy he requested—a complete rescission of the merger, the restoration of the parties to their former position, and the classification of Eriksson's cash advances as loans.

A. The Fiduciary Duties Owed To A Minority Member Of A Closely Held Business And The Remedies For A Breach Of Those Duties

As the trial court correctly noted, ATT was a "closely held business." [R. App. 298 (Decision p. 15)]. The Supreme Judicial Court has applied Massachusetts law regarding closely held corporations to small business entities organized as limited liability companies. *Pointer v. Castellani*, 455 Mass.

537, 538 (2009). A closely held corporation is characterized by "(1) a small number of stockholders; (2) no ready market for the corporate stock; and (3) substantial majority stockholder participation in the management, direction and operations of the corporation." *Id.* at 549. *See Brodie v. Jordan*, 447 Mass. 866, 868–869 (2006); *Donahue v. Rodd Electrotype Co. of New England, Inc.*, 367 Mass. 578, 586 (1975). While closely held businesses may have their advantages, the "structure may 'suppl[y] an opportunity for the majority stockholders to oppress or disadvantage minority stockholders [through] a variety of oppressive devices, termed "freeze-outs."'" *Id.* at 550, quoting *Donahue v. Rodd Electrotype Co. of New England, Inc.*, 367 Mass. at 588. A freeze-out generally occurs when, through improper means, "the majority frustrates the minority's reasonable expectations of benefit from their ownership of shares." *Brodie v. Jordan*, 447 Mass. *at* 869. *See Spenlinhauer v. Spencer Press, Inc.*, 81 Mass. App. Ct. 56, 70 (2011).

Because of the potential for abuse, and "'[b]ecause of the fundamental resemblance ... to [a] partnership ... stockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another[, that is,] the "utmost good faith and

loyalty."'" *Pointer v. Castellani*, 455 Mass. at 549, quoting *Donahue v. Rodd Electrotype Co. of New England, Inc.*, 367 Mass. at 592–593 and *Cardullo v. Landau*, 329 Mass. 5, 8 (1952). *See Greenleaf Arms Realty Trust I, LLC v. New Boston Fund, Inc.*, 81 Mass. App. Ct. 282, 293 (2012).

Courts generally have broad equitable powers to address breaches of fiduciary duty in a closely held entity, and the trial court's choice of a particular remedy will be reviewed for abuse of discretion. *Brodie v. Jordan*, 447 Mass. at 871. *See Demoulas v. Demoulas*, 428 Mass. 555, 589 (1998); *Zimmerman v. Bogoff*, 402 Mass. 650, 661 (1988). Nevertheless, where the majority shareholders breach their fiduciary duties and freeze-out the minority members, "[t]he proper remedy . . . is 'to restore [the minority plaintiff] as nearly as possible to the position he would have been in had there been no wrongdoing.'" *Brodie v. Jordan*, 447 Mass. at 870, quoting *Zimmerman v. Bogoff*, 402 Mass. at 651.

B. The Trial Court Abused Its Discretion In Imposing A Limited Remedy For The "Freeze-Out" That Fell Far Short Of Restoring Allison To The Position He Would Have Been In Had There Been No Wrongdoing And That Effectively Rewarded Eriksson For His Wrongful Conduct

In this case, the Court correctly found that Eriksson did not undertake the freeze-out to benefit ATT. He did so in order to accomplish his personal goal of seizing control of the company and extinguishing virtually all of Allison's rights under the operating agreement, none of which he could have done under the terms of the ATT Operating Agreement.[5]

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[5] A comparison of the ATT Operating Agreement (Trial Exhibit 8) with the ATT Delaware Operating Agreement (Trial Exhibit 102) illustrates the scope of Eriksson's interference with Allison's reasonable expectations.

Under Section 5.01 of the ATT Operating Agreement, Allison was entitled to participate in the management and control of the Company's business and affairs. Sections 6.01 and 6.03(a) of the ATT Delaware Operating Agreement, which provide that ATT Delaware shall be managed by a Board of Directors elected by holders of a majority of shares, supplanted those rights.

Section 10.02A of the ATT Operating Agreement provided that any amendments to the agreement would require the written consent of both Allison and Eriksson. In contrast, the ATT Delaware Operating Agreement provides that it may be amended only by the Board of Directors without the consent or approval of any member.

Section 10.02A also provided that the percentage interest of a member could not be altered without the consent of such member. The ATT Delaware Operating Agreement states that the Board of Directors may issue additional shares of stock on such terms and conditions as the Board determines, thereby diluting the equity interests of other members.

Specifically, The ATT Operating Agreement (Trial Exhibit 8) states that the members "shall have exclusive discretion in the management and control of the business and affairs of the Company," and that they "shall act by vote of their Percentage Interests." (Section 5.01). To implement and protect these rights, Section 9.01 of the agreement sets

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Section 5.03C of the ATT Operating Agreement provided that the members were under a duty to conduct the affairs of the Company in good faith and in accordance with the terms of the agreement, which essentially mirrors the obligations of shareholders under Massachusetts law. *See Pointer* and *Donahue supra*. In contrast, Section 6.04(a) of the ATT Delaware Operating Agreement provides that the members' respective obligations to each other are limited to the express obligations set forth in the agreement, and that the members have no other duties to one another or to the company, including fiduciary duties.

Section 8.01 of the ATT Operating Agreement provided that the books and records of the Company would be available for examination by any member. In contrast, Section 7.01 of the ATT Delaware Agreement states that no member shall have any right of access to any of the books or records of the company, or to receive any information about its business, other than receipt of one annual IRS Form K-1 per year and attendant state tax forms.

Section 6.02A of the ATT Operating Agreement provided that any member could assign any part of his interest in the Company to members of his family. However, Section 8.01(b)(ii) of the ATT Delaware Operating Agreement states that no member may assign shares without the approval of the Board of Directors, which approval may be withheld in the Board's absolute discretion.

Finally, Section 2.02 of the ATT Operating Agreement provided that no member would engage in any business which was competitive with the business of the Company. In contrast, Section 6.07(a) of the ATT Delaware Agreement provides that any member or director may have business interests which compete with the company.

forth certain procedures. Meetings of the members must be called and held upon notice given to all members not less than five business days prior to the meeting. The notice may be given by any member. Each member has the right to object to a meeting on the ground that it was not lawfully called or convened. The member may attend the purported meeting for the purpose of objecting, and his presence will not be construed as a waiver of the notification requirement. The intent of Section 9.01 is to ensure that each member receives notice of any action that other members propose to take, with sufficient time to respond if the proposed action is not permitted or is contrary to law. No member, including a minority member, may be excluded from attending and participating at any meeting. These requirements may be waived only by unanimous written consent.

As the trial court found, Proppe executed an Agreement and Plan of Merger on behalf of ATT and ATT Delaware on May 29, 2012. "That evening, Eriksson and Proppe met with Allison and informed him of the transaction. He had no prior notice of it, or Schall's representation of ATT." [R. App. 294 (Decision p. 11)]. A further document entitled "Written Action of the Members in Lieu of Meeting" (Trial Exhibit 104) indicates that Eriksson, Gudrun

Eriksson, and Proppe purported to authorize the merger by exercising their voting rights as members.

Notwithstanding the settled law set forth above—that the presumptive remedy requires that the minority shareholder be restored as nearly as possible to the position he would have been in had there been no wrongdoing—the trial court declined to rescind the merger. The court did so for two reasons. First, the court concluded that Allison failed to act promptly in seeking judicial relief from the merger. Second, the court concluded that Allison had taken positions that do not appear to be consistent with his own fiduciary duties to Eriksson. The record fails to support either conclusion.

1. Allison Acted Promptly To Protect His Rights

On June 17, 2012, just seventeen days after the merger, Allison sent an email to Eriksson and Proppe (Trial Exhibit 108) in which he protested the fact that the merger was accomplished in secret without a meeting of members. He then stated:

> This scheme is a sham transaction. It has no legitimate business purpose. It is not a merger between two bona fide companies. You are trying to use the form of a merger to achieve a drastic amendment of the [ATT Operating] Agreement, something you had agreed not to do without the appropriate consents. Your main purpose is to take away the rights of the other Members and to prepare for the reduction of their equity ownership in the Company.

[R. App. 158]. He proposed to Eriksson and Proppe that:

> [t]he members should take action to cancel, reverse, and set aside all of the actions you have taken under the merger scheme. The Company and its Members should be returned to the same legal and business status that existed before you began the scheme."

[R. App. 159]. He ended the email by stating:

> You are leaving your fellow Members no choice other than bringing an action against you for appropriate relief and remedies. The action would be based upon your breach of the [ATT Operating] Agreement, your breach of your fiduciary obligations under Massachusetts law, and other applicable theories of recovery.

[R. App. 159]. It is thus clear that Allison registered a timely objection to the clandestine merger.

Failure to comply with the applicable requirements for authorization makes the merger "voidable at the insistence of a shareholder who for any reason objects to the merger and is not by his actions estopped from voicing his objection thereto." *Fordie H. Pitts, Jr. v. Halifax Country Club, Inc. et al.*, 19 Mass. App. Ct. 525, 532 (1985). *See Bushway Ice Cream Co. v. Fred H. Bean Co.*, 284 Mass. 239, 245 (1933) (action taken at special meeting of stockholders, call for which was not issued in accordance with corporate by-law, held to be a nullity).

Notwithstanding Allison's prompt objection to the merger, Eriksson essentially ignored his demand for rescission. Moreover, as noted above, Allison specifically warned Eriksson in his e-mail that he would seek judicial relief if the defendants did not cancel the merger and restore ATT and the members to their legal and business status prior to the merger. Thereafter, in October of 2012, Allison, Eriksson, Proppe and Schall engaged in settlement negotiation, which began in August and lasted into October, 2012. When those negotiations proved fruitless, Allison filed his verified complaint in May of 2013.

The trial court focused on Eriksson's investment of more than $900,000 in the newly merged company in concluding that he would be unfairly prejudiced by Allison's delay in bringing this action. As reflected in Trial Exhibit 125, Eriksson invested $250,000 on June 28, 2012, he invested a total of $318,536.38 between January 23, 2013 and April 22, 2013, and he made four additional investments in the aggregate amount of $355,000 following the filing of Allison's verified complaint.

Notably, however, he made all of these investments after Allison placed him on notice that he intended to seek judicial relief, and he invested more than a third of the funds after the filing of the complaint. More important, Allison does not

suggest that Erikson forfeit these funds. He asks that the funds be treated as a loan to the company, as the parties had agreed in the ATT Operating Agreement and had done in the past. While that solution may not be preferable to Eriksson, he unquestionably came to the court with "unclean hands", having used those funds to dilute Allison's share in the merged company. Erikson should not be permitted to reap the benefit from his own inequitable conduct. *See Flynn v. Haddad*, 25 Mass. App. Ct. 496, 506 (1988). *See also Edinburg v. Edinburg*, 22 Mass. App. Ct. 199, 208 (1986) (courts "will not look kindly on one who seeks to benefit by his own turpitude"). *See also Demoulas v. Demoulas*, 432 Mass. 43, 67 (2000) (settled law that "one who seeks equity must do equity and that a court will not permit its equitable powers to employed to accomplish an injustice"); *Clark v. Greenhalge*, 411 Mass. 410, 417 (1991) (same); *Fordie H. Pitts, Jr. v. Halifax Country Club, Inc. et al.*, 19 Mass. App. Ct. at 533 (same).

2. Allison Did Not Breach His Fiduciary Duties Toward Eriksson

Allison, of course, was subject to the same fiduciary duties as Eriksson, and he therefore had an obligation to act in a manner consistent with those duties. In this case, the trial court did not find

that Allison breached any fiduciary duty owed to Eriksson. However, in crafting a remedy for Eriksson's breach, the trial court suggested that "Allison's position that he would not invest anything more in ATT or secure its debt with personal assets, while simultaneously asserting his right against diluting his interest, does not appear consistent with his fiduciary responsibilities to Eriksson." [R. App. 299 (Decision p. 16)]. The trial court therefore concluded that rescinding the merger and restoring the parties to their former state would be inequitable.

Notably, however, Allison had every right under the terms of the ATT Operating Agreement to take the positions that he did, regardless of whether it was contrary to Eriksson's wishes. In fact, he specifically relied on the terms and conditions of the operating agreement in taking those positions both before and after the merger. The agreement was comprehensive and detailed, and it entirely governed the rights and duties of the parties. Where Allison's challenged conduct was clearly contemplated and determined by the terms of the ATT Operating Agreement, the court should not have considered his assertion of his position as to the best course of action for moving the company forward as even an implicit breach of his fiduciary duty. *Selmark*

Associates, Inc. v. Ehrlich, 467 Mass. at 536; *Chokel v. Genzyme Corp.*, 449 Mass. 272, 278 (2007); *Blank v. Chelmsford Ob/Gen, P.C.*, 420 Mass. 404, 408-409 (1995). The trial court penalized Allison for exercising rights to which all members of ATT had agreed.

3. To The Extent That The Trial Court Relied On The So-Called Right Of "Selfish Ownership" Typically Enjoyed By Majority Shareholders In Justifying Eriksson's Conduct, Such Reliance Is Misplaced

At the start of its rulings of law, the trial court refers to the concept that majority shareholders have certain rights to "selfish ownership" in the corporation which should be balanced against the concept of fiduciary obligations to the minority shareholders. He states that this concept permits the majority shareholders "room to maneuver" and "a large measure of discretion." [R. App. 298-299 (Decision p. 15-16)]. As authority for this concept the court cites *Pointer v. Castellani*, 455 Mass. at 550, which relies on the seminal case of *Wilkes v. Springside Nursing Home, Inc.*, 370 Mass. 842 (1976).

Wilkes acknowledged "the fact that the controlling group in a close corporation must have some room to maneuver in establishing the business policy of the corporation." 370 Mass. at 851. As

examples of business policy decisions, the court mentions "…declaring or withholding dividends, deciding whether to merge or consolidate, establishing the salaries of corporate officers, dismissing directors with or without cause, and hiring and firing corporate employees." *Id.* at 863. However, nothing in *Wilkes* suggests that the majority has the right to alter foundational organization agreements such as the articles of organization of a corporation or the operating agreement of a limited liability company. And while a legitimate merger may fall within the concept of business policy, the trial court found that the merger was a sham, conducted for the sole purpose of freezing out the minority members, and accomplished in secret and in violation of the terms of the ATT Operating Agreement.[6]

4. The Only Remedy That Will Restore The Parties To Where They Were Is Rescission Of The Merger

At trial, Allison sought a remedy that would declare the merger of ATT into ATT Delaware void *ab*

[6] "In this case, Eriksson certainly did not act with utmost good faith toward Allison when he surreptitiously retained Schall to represent ATT and then adopted Schall's advice to merge ATT into ATT Delaware, thereby effectively unilaterally amending the operating agreement in a manner that not only permitted him to invest equity in ATT without Allison's consent, thereby diluting Allison's interests, but also deprived Allison of all minority rights that Delaware law permitted the parties to an operating agreement to eliminate by contract." [R. App. 298 (Decision p. 15)].

initio. He seeks the same remedy now, under which ATT would be revived by operation of law, and the legal existence of ATT Delaware would be cancelled. All right, title, and interest in and to any property created or owned by ATT Delaware would then vest in ATT, subject to bona fide obligations and liabilities incurred in the ordinary course of business by ATT Delaware. All actions taken by ATT Delaware, including the actions of any member, director, or officer thereof, would be construed, executed, and enforced as if the same had been undertaken pursuant to the ATT Operating Agreement. All amounts of money or property paid or transferred to ATT Delaware by any person, whether characterized as purchases of stock or loans or otherwise, would be treated as loans made to ATT pursuant to the ATT Operating Agreement. ATT would then restate its financial statements for all years beginning in 2012 in accordance with the ATT Operating Agreement, and ATT would amend and refile its federal and state income tax returns for such years. The equity membership interests in ATT would be held as follows: Eriksson, Eriksson Trust, Proppe, and Michael Broomhead, collectively: 75.5%; Allison: 14.66; Allison Trust: 7.84%; and Baker: 2%.

The trial court's ruling that rescission and restoration are not possible or feasible is flawed.

To the extent that the trial court relied upon *Lynch v. Vickers Energy Corp.*, 429 A.2d. 497, 501-503 (Del. 1981), such reliance is misplaced. *Lynch* involved a large corporation with publicly traded shares. During and after a complex tender offer, many shareholders sold their shares. The tender offer was the subject of lengthy legal proceedings. By the time the offer was adjudicated to be unfair, the corporate landscape had changed substantially. The court held that rescission was therefore not feasible and crafted a judgment based on monetary damages.

Here, Eriksson is the dominant shareholder. His son-in-law, Michael Broomhead, ATT Delaware's sole employee, has a small number of shares, which he received in connection with his employment. Proppe holds "a small equity interest" for which he paid no monetary consideration. [Transcript, p. 286]. Unlike *Lynch*, it would not be complicated to undo the merger. As discussed above, Eriksson may not like the remedy requested, but he invested funds into ATT Delaware only after Allison objected and raised the specter of legal action to set aside the merger, and as to some of the funds, after Allison had filed suit. In view of his wrongful behavior and the fact that he was on notice that Allison objected to his conduct prior to any such investment, it would be fair to convert that investment from equity to a

loan. Such a remedy would come much closer than the remedy adopted by the trial court to restoring the parties as nearly as possible to their positions prior to the wrongdoing. *See Brodie v. Jordan*, 447 Mass. at 870.

The remedy adopted by the trial court attempts to split the baby, and in doing so, it falls far short of restoring the parties to their prior positions for a couple of reasons. First, the court assumed that its task is to restore "the rights that minority members of a Delaware limited liability company enjoy absent contractual agreement to do away with them." [R. App. 302 (Decision p. 19)]. Prior to the freeze-out, pursuant to the ATT Operating Agreement, all members had access to ATT's books and records, and each member had the right to participate in the management of ATT's business and affairs. Although Eriksson and his trust held voting control, the other members were entitled to notice of meetings and the opportunity to be heard and to participate in decision making. By virtue of such participation, all members were able to interact with their fellow members and to receive current information about the Company's business performance and prospects. Under the trial court's revised agreement, no member may participate in management unless invited to do so by Eriksson. The minority members' access to information

about ATT Delaware is limited to the rights, procedures, and limitations articulated in Section 18-305 of the Delaware Limited Liability Company Act. That section provides that a member may request written information about the company and that the company must comply with the request, but the act has many options to limit the scope of its compliance. The trial court augmented this right to information by requiring the Board of ATT Delaware to issue reports to Allison, but not more than three times annually. Allison has no right to meet with the Board. Prior to the merger, Allison also had the right to participate in any proposed amendment of the ATT Operating Agreement and to withhold his consent if he so chose. The court's remedy does not restore this right.

Second, and perhaps more important, the reduction of Allison's equity in the reconstituted company substantially reduced the value of his investment. The trial court acknowledged the fatal flaw in the Orchard Partners appraisal obtained by Eriksson—namely, that it did not attempt to value the intellectual property and assumed that Eriksson's investment in the company following the merger represented the entire value of the company.[7]

[7] "It [(the Orchard Park appraisal)] was curiously principally based on a discounted cash flow valuation,

However, the court then apparently assumed that that appraisal was correct, that the intellectual property had no value, and that the company therefore had a negative net worth at the time of the merger. The court's assumption overlooks the fact that the real value of the company may indeed be tied to the value of its intellectual property and that Eriksson likely would not have invested more than $900,000 in a company with no valuable assets and a negative net worth. If the intellectual property has substantial value, even the grossed up percentage of ATT Delaware represents a transfer of much of the value of Allison's investment to Eriksson, effectively rewarding him for his misconduct.

The trial judge embarked on a journey of equitable compromise that was not warranted. Allison's actions are protected by *Selmark Associates, Inc. v. Ehrlich*, 467 Mass. 525, 541-544 (2014), which provides that where the parties intended that a contract would entirely govern their

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although ATT had not generated any significant income in the last few years, and its only significant assets was its IP. Orchard Partners apparently did not consult with anyone who could value the IP. Orchard Partners concluded that 100% of the equity of ATT had a value of $239,000, but only if $620,000 of "funding" was provided to ATT. According to Orchard Partners, in the absence of that funding, ATT's value was $0. Or stated differently, someone would have to commit $620,000 to ATT and then the company would be worth $239,000." [R. App. 293 (Decision p. 10)].

relationship and obligations, that contract should be enforced. In this case, the trial court found Eriksson's conduct to be a breach of fiduciary duty. That breach alone is sufficient to disqualify Eriksson from receiving any form of equitable relief. Certainly, he should not have the benefit of having the parties' future relationship governed by an agreement he adopted in furtherance of the freeze-out and that gave him substantial advantages that he did not enjoy under the parties' original agreement. Instead, the ATT (Massachusetts) Operating Agreement should be enforced and should govern the parties' relationship going forward. Based on the reasons set forth above, the merger should be rescinded, and the original agreement should be reinstated.

II. Conclusion

Based on the authorities cited and the reasons aforesaid, Allison requests that this Court set aside the trial court's judgment, rescind the challenged merger, and grant him such other relief as he may be entitled.

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By his attorney,

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W. Robert Allison
Plaintiff/Appellant
v.

Elof Eriksson & others
Defendants/Appellees

Addendum

Table of Contents

6/29/16
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(MD)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
CIVIL ACTION
NO.13-1858-BLS1

W. ROBERT ALLISON

v.

ELOF ERIKSSON, GUDRON ERIKSSON, Individually and as Trustee of the Elof Eriksson Irrevocable Trust-2003, and KARL H. PROPPE, Individually and as Trustee of the Elof Eriksson Irrevocable Trust-2003

FINDINGS OF FACT, RULINGS OF LAW AND ORDER FOR THE ENTRY OF JUDGMENT FOLLOWING A JURY WAIVED TRAIL

INTRODUCTION

This case arises out of a dispute between the members of Applied Tissue Technologies LLC (ATT), a limited liability company originally organized under the laws of Massachusetts, but later merged with and into a Delaware limited liability company of the same name (ATT Delaware).

The case was tried to the court on April 4, through April 7, 2016. Six witnesses testified and 140 exhibits were received in evidence. Notwithstanding this substantial evidentiary record, the court finds that very few material facts are in dispute. Rather, the very difficult questions raised by this case involve the legal consequences of the parties' conduct and the equitable relief that the court may appropriately enter.

FINDINGS OF FACT

The plaintiff, W. Robert Allison, is a graduate of Harvard College and Stanford University Law School. He practiced law in Boston for approximately 30 years, specializing in business and real estate matters. In 1997, he left the practice of law to become president of a software company, but lost that position two years later when the company was sold. In 1999, Allison was looking for another business opportunity, as he did not wish to return to the practice of law.

The defendant, Elof Eriksson, M.D., Ph.D., was, until recently, Chief of the Division of Plastic Surgery at Brigham and Women's Hospital (BWH). He trained both in Sweden, where he was born, and in the United States, joining the BWH staff in 1986. He is listed as the inventor on several patents, including of relevance to this case, patents relating to the treatment of wounds.

Allison and Eriksson first met in 1995, when Eriksson was referred to Allison as an attorney who could represent him in connection with a business opportunity. They met briefly, but Eriksson decided not to pursue the opportunity, and Allison never sent Eriksson and engagement letter or a bill for his time.

Allison and Eriksson next encountered one another in 1999. Eriksson wanted to found a business based on intellectual property (IP) having to do with the treatment of wounds that he patented while at BWH and had purchased from BWH for approximately $150,000. He contacted Allison who explained that he was no longer practicing law, but was himself looking for a business opportunity. After discussions, the two agreed that they would form ATT together. Allison contributed $15,000 and Eriksson $45,000 and the IP; in 2002 ATT

reimbursed Eriksson the sum he had paid to BHW for the IP. Eriksson received 75% of the membership interests (or points) in ATT and Allison 25%.

Allison formed ATT by filing its Certificate of Organization with the Massachusetts Secretary of State on January 28, 2000. He also prepared ATT's operating agreement which was signed by him and Eriksson on that same date. Allison used a very simple form of operating agreement as the template, which he obtained from the internet.

The parties dispute whether Allison was acting as Eriksson's attorney in connection with the formation of ATT. The court finds that he was not. The court finds that Allison had decided before he and Eriksson first discussed ATT that he would no longer practice law. Eriksson may not have fully appreciated the distinction between managing the legal affairs of the LLC and acting as lawyer either for ATT or Eriksson or both; however, the court finds that no attorney/client relationship was established between Allison and Eriksson. In any event, Allison and Eriksson showed the operating agreement to attorney Sam Mawn-Mahlau, then with the firm of Edwards & Angell LLP, who found it acceptable for a company just starting-up. Mawn-Mahlau was an attorney with whom Eriksson had worked while at BWH. Mawn-Mahlau went on to provide legal services for ATT through 2011. The court also notes that no material disputed issue of law or fact turns on the question of whether Allison was representing Eriksson.

Of relevance to this action, the original operating agreement contained the following provisions. Eriksson and Allison were the only two members of ATT, and the company was to be managed by its members who voted based on their respective membership interests; there were no provisions either for managers nor a super majority vote for particular matters. However, additional capital contributions required the unanimous consent of all members. Eriksson argues that this provision was unfair to him. The court finds that such a provision is not

uncommon in a joint venture involving two participants who agree that they must both consent to certain, fundamental business changes, even though they do not have equal interests in the profit and loss of the enterprise.

Allsion became the president and chief executive officer of ATT, and was responsible for managing the business. ATT rented office space in Newton, where Allison worked. The parties agreed that Allison would receive compensation of $225,000 a year to run the day-to-day affairs of the company and Eriksson $100,000 a year as a consulting fee.[1]

In September, 2000, ATT entered into an agreement to license certain of ATT's IP with a third-party which generated $3.9 million in licensing and royalty revenues before it ended in 2005. During this time, substantial work was done on new technology and new patent applications were filed. The law firm Quarles and Brady represented ATT in connection with intellectual property matters. The parties began to take their salaries sometime in 2001. Additionally, during these years substantial distributions of cash were also made to each.[2] At some point, ATT hired a full time employee, Christian Baker. Baker had worked for Eriksson at BWH as an operating room technician. In 2004, he was added as a member of ATT, receiving a 2% of the points from Allison and Eriksson, who each transferred interests to Baker according to their 25%/75% split.

In late 2003, Allison and Eriksson decided to distribute some of their points in ATT to trusts established for the benefit of family members as an estate planning device. Mawn-Mahlau

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[1] At some point, the parties agreed to reduce their salaries to $100,000 and $60,000 a year, respectively. The date these salaries were reduced is not clear.

[2] Between 2000 and 2005, Allison received $1,068,427 in distributions and salary from ATT. Allison testified that some of this was deferred compensation for a period before ATT had cash to pay him, but there were no documents reflecting a distinction between distributions and payment of deferred salary, such as a W-2, introduced in evidence, and the court doubts that the parties paid close attention to this issue.

and one of his partners provided the legal work for this task. Allison and his son were the trustees of a Trust for the benefit of Allison's family (the Allison Trust) and Gudrun Eriksson (Eriksson's wife) and Dr. Karl Proppe, a physician and close friend of Eriksson, were the trustees of the Trust for the benefit of Eriksson's family (the Eriksson Trust).

In connection with the transfer of these points to the Trusts, Mawn-Mahlau prepared a more lengthy and sophisticated "First Amended and Restated Operating Agreement" (the Operating Agreement) which the parties executed at the time the Trusts were admitted as members. Eriksson paid little attention to the preparation of the Operating Agreement, which he understood generally to carry-forward the arrangements agreed to in the original operating agreement. The Operating Agreement created the position of Manager who was to be elected by the Voting Members and provide the day-to-day management of ATT's affairs; Allison became the Manager. It also defined the term "Original Members" to be Eriksson and Allison. The Original Members had to agree to the addition of any new members of ATT, who could be either voting or non-voting. Notably, any change to the Operating Agreement also required the consent of the Original Members, and no change in the Operating Agreement that had the effect of reducing any member's interest in ATT or interest in distributions from a sale of its assets or cash flow could be made without the consent of the affected member. This provision therefore served to prevent the dilution of any member's interest in ATT, without that member's consent. This created somewhat more protection for minority members than had previously existed; however, with respect to Allison, it generally carried forward the provision in the original operating agreement that both he and Eriksson had to agree to any further capital contributions. The Operating Agreement set the membership vote required for most significant business

decisions at 60%, but as Eriksson and his family Trust continued to hold 75% of the points, this was not a significant change.

By September, 2005, ATT was no longer generating revenues and Allison and Eriksson agreed that ATT would stop paying their salaries. The parties are in sharp dispute as to whether they agreed that deferred salaries would accrue, to be paid at a later date when ATT was financially able to pay them, or simply discontinued, to be resumed at some time in the future. Their testimony is consistent that the decision was reached in a brief conversation and was not documented in any writing. The court finds that Eriksson and Allison may have different views as to exactly what was agreed upon, but also finds that there was no meeting of the minds that salaries would be deferred to some indefinite date in the future. There is no evidence that the topic was discussed again until late 2011. Further, ATT's financial records, maintained by Allison, never reflected deferred salaries as either a contingent or fixed liability.

ATT continued to generate very little revenue. In 2007, it could no long afford to pay Baker, and he was terminated. A dispute arose between Allison and Eriksson concerning the terms of Baker's departure. While the parties disagree concerning the facts underlying Baker's termination, they are not material to the outcome of this case. It is sufficient to state that Allison and Eriksson resolved their dispute concerning Baker's termination by Allison's transfer of 2% of his points to Eriksson. After that transfer, ATT's points were held by its members in these percentages: Eriksson – 55.5%; Eriksson Trust – 20%; Allison – 14.66%; Allison Trust – 7.84%; and Baker – 2%.

During the period, 2006 to 2008, Eriksson lent ATT $200,000 to cover operating expenses, which was later repaid to him with interest accrued at 15%. In or around this period, Allison looked for work outside of ATT, which, as noted above, was not paying him, but found

only a few weeks of work in a temporary placement. He did not seek work as a lawyer. The parties are in dispute concerning how many hours a week Allison worked on ATT's affairs between 2005 and 2011. There is insufficient evidence in the record from which the court can make any finding on this. It appears likely that during some weeks Allison devoted substantial time to ATT, and on other occasions it did not require very much of his attention.

In December, 2008, ATT entered into an asset purchase agreement with Wright Medical Technology, Inc. (Wright) pursuant to which ATT sold to Wright its interests in a wound care technology that the parties refer to as the XPansion product or kits. The purchase price was effectively $1,000,000, plus additional royalties to be paid ATT as Wright sold XPansion kits. Unfortunately, Wright did not sell very many kits and the royalty stream from this product was meager.

In March, 2010, Dr. Karl Proppe became the Chief Executive Officer of ATT. Allison relinquished that position, but continued on as President and Manager of ATT. How the duties of each would differ is not clear, but Proppe was intended to lead ATT in the development of a negative pressure wound treatment technology. Proppe did not make a financial contribution to ATT and did not receive any points. Allison continued to be responsible for the general management of ATT's business.

In May, 2011, Wright notified ATT that it was exiting the wound care business and would no longer be selling XPansion kits. Thereafter, Allison led negotiations with Wright for the reacquisition of Xpansion; he received legal assistance from Mawn-Mahlau. The repurchase agreement was finalized in September, 2011. Under its terms, ATT was to pay Wright a 6% royalty on sales, capped at $1,000,000, and to purchase the 4,445 XPansion kits that were then in Wright's inventory at a price of just over $100 each over the next year, a $450,000 obligation.

Allison attempted to find third-party sales representatives to market XPansion, but was unsuccessful. A decision was reached that ATT would hire an experienced sales person to market XPansion.

During the summer and fall of 2011, Allison prepared revenue and expense projections for ATT, but became frustrated by Eriksson's failure to discuss and comment upon them. The projections, however, were not based on any market research concerning the likely sales of XPansion, but rather simply identified the revenue that would be generated if certain numbers of kits were sold at various prices.

On November 15, 2011, Allison sent a letter to Eriksson and Proppe stating that he was resigning as Manager and President of ATT. He was willing to provide services to ATT on a part time basis for a fee of $50 an hour. On December 19, 2011, Allison, Eriksson, and Proppe met at what they described as a "members meeting." Among many other matters that were discussed, Allison asserted that ATT owed him his deferred salary at the rate of $100,000 annually since November, 2005. Eriksson responded that they had not agreed to defer compensation but rather to discontinue salary, until ATT could afford to start paying it again, and Allison had not worked at ATT full time since 2005. Everyone understood that the company needed to raise capital, but disagreed on how to accomplish that. Allison agreed that he would provide some services to ATT without demanding compensation, and assist in transitioning work to Eriksson's wife who would assist with bookkeeping and a new marketing director.

Neil Webber was hired as vice president of sales and marketing in December, 2011, to begin in January, 2012; he was initially to focus on selling the Xpansion kits. His annual salary was $200,000. He was not successful in selling the product.

The ATT members met again on January 25, 2012. The question of whether Allison was owed deferred compensation was discussed, but the parties were unable to resolve their dispute. The need for additional capital was the principal topic of discussion, as ATT was nearly out of cash. Eriksson stated that he was no longer willing to loan money to the company as he had in the past, but was willing to make a further investment for additional equity. Allison responded that he was unwilling to have his interest diluted, unless the investment came from an outside investor. No one was aware of any potential outside investor, and generally agreed that ATT was at least a year away from being able to attract any outside investors. Eriksson asserted that the Operating Agreement needed to be amended, presumably so that he could invest equity over Allison's objection, but was non-specific concerning what the amendments should be.

These issues continued to be discussed and the subject of email exchanges over the next two months. Allison's position was firm that he would not (and could not afford to) invest in the company and would not agree to have his interest diluted by a further equity investment from Eriksson. At one point, Eriksson specifically offered to invest $600,000, if Allison would invest $200,000, but Allison rejected this proposal. He also would not agree to use personal assets to secure a bank loan to ATT. Eriksson was frustrated by Allison's position that he would no longer serve as the President and Manager of ATT, was unwilling to commit personal assets to the firm, and insisted that his ownership interest not be diluted (except by an outside investor that no one believed would materialize). At one point, Eriksson suggested that ATT would have to be dissolved.

Eriksson's daughter, Emma Eriksson Broomhead, was then an associate at the Waltham office of the law firm, Gunderson Dettmer, LLP. Broomhead arranged a meeting for her father with a senior attorney at Gunderson, Gary Schall. The three met on February 9, 2012. Eriksson

explained his concerns regarding ATT. Various approaches were considered, including Eriksson buying out Allison or a purchase of all the assets of ATT by another company. It was decided that an appraisal of ATT was necessary. Schall and Gunderson were retained to represent ATT; Proppe signed the engagement letters.[3] No one told Allison that Schall had been retained; Schall also did not contact Mawn-Mahlau, who had been outside counsel to ATT for over ten years. The court finds that Eriksson, Proppe and Schall all specifically chose not to let Allison know of Schall's engagement.

At Schall's recommendation, ATT engaged Orchard Partners, Inc. to do the appraisal. Eriksson told Allison about the appraisal, but not about Schall's involvement or the actual purpose for it. Orchard Partners did not meet with Allison in connection with the engagement. The appraisal was issued on April 16, 2012. It was curiously principally based on a discounted cash flow valuation, although ATT had not generated any significant income in the last few years, and its only significant assets was its IP. Orchard Partners apparently did not consult with anyone who could value the IP. Orchard Partners concluded that 100% of the equity of ATT had a value of $239,000, but only if $620,000 of "funding" was provided to ATT. According to Orchard Partners, in the absence of that funding, ATT's value was $0. Or stated differently, someone would have to commit $620,000 to ATT and then the company would be worth $239,000.

In April, 2016, Eriksson lent $26,000 to ATT, as it was out of cash and unable to pay its bills, including Webber's salary.

[3] In April, 2012, Schall moved his practice to WilmerHale, LLP. A new engagement letter was signed and Schall continued to represent ATT/Eriksson as he had while at Gunderson.

In May, 2012, Schall and Eriksson began to focus on two approaches to deal with Allison. Eriksson would make an offer to purchase Allison's and the Allison Trust's interests in ATT based on the Orchard Partners appraisal. If he refused the offer, Eriksson would form ATT Delaware, which would have a new operating agreement that would accomplish Eriksson's goals. Eriksson would then vote his points in ATT to cause ATT merge with and into ATT Delaware. Schall reasoned that because under G.L. c. 156C, § 60 a merger can be approved by members owning more than 50% of the unreturned capital contributions of a limited liability company, Eriksson could cause the merger to occur without Allison's involvement and this merger would therefore not constitute a breach of Eriksson's fiduciary duties to Allison, regardless of the terms of new operating agreement.

On May 6, 2012, Eriksson offered to purchase Allison's and the Allison Trust's points in ATT for $53,775, *i.e.,* 22.5% of the $239,000 valuation. The offer also required Allison to release his claims for deferred compensation. On May 8, 2016, Allison rejected the offer.

From May 5 to 21, 2012, Proppe was in Norway. Upon his return, Eriksson explained Schall's merger plan to him and recommended it. After several phone calls, Proppe agreed to help implement it. ATT Delaware was formed on May 25, 2012, when its Certificate of Formation was filed in the Office of the Secretary of State of Delaware. The Agreement and Plan of Merger was executed by Proppe as "Manager and Chief Executive Officer" of each of ATT and ATT Delaware on May 29, 2012. That evening Eriksson and Proppe met with Allison and informed him of the transaction. He had no prior notice of it, or Schall's representation of ATT. The Agreement of Merger was filed in the Massachusetts Secretary of State's office on June 1, 2012.

There are significant differences between the rights of members under the ATT Operating Agreement and the ATT Delaware Amended and Restated Limited Liability Operating Agreement (the ATT Delaware Agreement). The ATT Delaware Agreement creates a new class of preferred shares, with a liquidation preference over the common shares. The power to manage ATT Delaware is expressly given to its Board, the members have no rights other than selecting directors. The Board is elected by the written consent of the holders of a majority of the shares of the company. The members have no fiduciary duty to the company or to each other, but rather only the duties specifically expressed in the ATT Delaware Agreement, all other duties or restrictions on self-interested actions are waived to the extent permitted by Delaware law. For example, the directors and members may compete with ATT Delaware by, among other things, owning or working for a business engaged in the same or similar activities or lines of business as ATT Delaware. Further, no member of ATT Delaware has any right of access to the books or records or to receive any information about the business or affairs of ATT Delaware, unless the Board decides to grant such access. The Board may also pick and choose which members may receive information and what information to disclose to them. There appears to be no restrictions on the Board's right to withhold information, except as it may be necessary to the preparation of a member's tax return. Also, no membership interest may be transferred without the approval of the Board, even to family members.

On June 17, 2012, Allison wrote to Eriksson and Proppe challenging the propriety of these transactions. On June 18, 2012, Eriksson signed subscription agreements pursuant to which he purchased $250,000 of preferred shares in ATT Delaware. Allison was given the opportunity to purchase sufficient preferred shares to maintain his percentage ownership interest in ATT Delaware, but declined. In or about July, Allison was denied further access to ATT's offices,

which by then had become the offices of ATT Delaware. Allison pointed out that, the subscription agreements required a purchaser to attest that he is an "'accredited investor' as defined in Rule 501(a) of the Securities Act," and he doubted that he could meet the financial requirements for that standard; although, the court finds that he would not have invested even if he could meet the accredited investor test.

Over the next 18 months, Eriksson purchased additional preferred shares such that his aggregate purchases (including the initial $250,000 investment) as of January 14, 2014 was $923,536. Although, Allison was given the opportunity to purchase preferred shares on each occasion that Eriksson did, he purchased none. In consequence, by that date, Allison's and the Allison Trust's ownership interest in ATT had been reduced to 3.32%. In the event of liquidation, his interests were subordinated to the preferred shareholders'.

In August, 2012, Allison, Eriksson, Proppe, and Schall met in an attempt to resolve Allison's claim that Eriksson had breached his fiduciary duty to him by authorizing the merger and his subsequent purchase of preferred shares. The meeting was very contentious with accusations of bad behavior being cast at one another by Allison and Eriksson.[4] At one point Schall asked Allison if he would rather have a small percentage of an ongoing business or 22.5% of a defunct one, and Allison responded a larger percentage of the failed business.

Thereafter, Allison met with Proppe and Schall (but not with Eriksson as Allison and Eriksson could not engage in useful conversation) two or three more times in September and October, 2012 in an attempt to reach a settlement. There appears to have been a willingness on the part of Eriksson to amend some of the provisions in the ATT Delaware Agreement to provide

[4] In particular, Eriksson believed that Allison had used his superior knowledge of the law to include in the operating agreement provisions that were unfair to him.

Allison with access to information and the opportunity to consult with Eriksson and Proppe on decisions affecting ATT Delaware, as well as a right of first refusal on additional investments or sale of shares. However, there was no willingness to reclassify Eriksson's investments as debt and restore Allison's percentage ownership in the company. Allison, made no offer in compromise that did not involve the return of his equity without risk of dilution except on the investment of a third-party. This action was, however, not filed until May, 2013.

In July, 2012, Michael Broomhead, Emma Eriksson Broomhead's husband, began helping out at ATT on a part time basis. He became CEO/CFO in November, 2012. By that time, Weber had been terminated. Since then he has been the only full time employee of ATT Delaware. Broomhead has an undergraduate degree in accounting and an MBA. He held management positions at other companies before joining ATT Delaware.

In 2013, the company generated $18,800 in revenue. In 2014, it generated $823,000 of revenue, most of this was from the sale of the Xpansion kits and an exclusive license to market them in the Western Hemisphere to a large medical equipment company. The company still operated at a loss during that year, as the cost of those goods included the payment to Wright medical as well as the costs of repackaging the product. Broomhead has unsuccessfully been trying to find a distributor for the kits in the Eastern Hemisphere. In 2015, ATT generated $461,033, almost all of that was from grants. Broomhead believes that the company will have an operating loss of $150,000 in 2016, which Eriksson has agreed to fund.

Much of the company's expenses are associated with work on new intellectual property and the legal fees associated with patent applications. Since 2012, it has filed 21 patent applications; 11 patents have been granted, 9 of those based on applications filed after 2012.

Broomhead has been actively looking for investors or partners for ATT. He believes that he has contacted 78 firms who were either potential investors or larger health care companies that might have an interest in ATT Delaware's products, without success. At present, he is unaware of any potential investor or partner for ATT. Broomhead has invested $10,000 in ATT Delaware and Proppe $30,000.

RULINGS OF LAW

Breach of Fiduciary Duty

In its Memorandum of Decision and Order on the Parties' Cross-Motions for Summary Judgment (the Decision), the court explained its ruling that the fact that (i) Eriksson controlled sufficient ownership interest in ATT to approve the merger without Allison's participation, and (ii) the Operating Agreement was silent on the topic of mergers, did not mean that Eriksson was insulated from claims that the clandestine merger of ATT into a Delaware entity that had an operating agreement that eliminated all protection for minority owners breached his fiduciary duty to Allison.[5] In the Decision, the court also explained that in Massachusetts minority shareholders also owe fiduciary duties to the other owners of a closely held business; and majority shareholders "have certain rights to what has been termed 'selfish ownership' in the

[5] "Judicial inquiry into a freeze-out merger in technical compliance with the statute may be appropriate, and the dissenting stockholders are not limited to the statutory remedy of judicial appraisal where violations of fiduciary duties are found." *Coggins v. New England Patriots Football Club*, 397 Mass. 525, 533 (1986). The rule is the same in Delaware: "The appraisal remedy we approve may not be adequate in certain cases, particularly where fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross and palpable overreaching are involved. . . . Under such circumstances, the Chancellor's powers are complete to fashion any form of equitable and monetary relief as may be appropriate, . . ." *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. S. Ct. 1983). There is nothing in the Limited Liability Company Act that would make this well-established tenet of business enterprise law inapplicable to limited liability companies.

corporation which should be balanced against the concept of fiduciary obligation to the minority permitting them room to maneuver and a large measure of discretion. . . . [T]he court must allow the controlling group to demonstrate a legitimate business purpose for its action." *Pointer v. Castellani,* 455 Mass. 537, 549-550 (2009).

In this case, Eriksson certainly did not act with utmost good faith toward Allison when he surreptitiously retained Schall to represent ATT and then adopted Schall's advice to merge ATT into ATT Delaware, thereby effectively unilaterally amending the operating agreement in a manner that not only permitted him to invest equity in ATT without Allison's consent, thereby diluting Allison's interests, but also deprived Allison of all minority rights that Delaware law permitted the parties to an operating agreement to eliminate by contract.[6] On the other hand, Allison's position that he would not invest anything more in ATT or secure its debt with personal assets, while simultaneously asserting his right against diluting his interest, does not appear consistent with his own fiduciary responsibilities to Eriksson. Allison paid lip service to the notion that he would agree to dilution if an outside investor could be found, but it was evident that no such third-party investor was going to appear in time to save ATT. According to Orchard Partners, if someone were to provide $620,000 of financing to ATT, it would then be worth $239,000. Certainly, Eriksson was not acting unscrupulously when he explained that he was not going to finance the company with debt for a period of years, while Allison retained 22.5% of the equity in the company and was unwilling to work for it any longer. Clearly, it was not

[6] It may be noted that Allison never signed the ATT Delaware Agreement. In consequence, while Eriksson treated him as a member of ATT Delaware, he never actually became one.

inappropriate for someone in Eriksson's position to insist on an equity holder's return on investment, if this very risky enterprise proved ultimately successful.[7]

In May, 2012, ATT was out of money. Eriksson loaned it $26,000 to meet expenses including payroll. Clearly, Eriksson could have allowed ATT to liquidate and bid on its only asset in a liquidation auction—its intellectual property. In that event, it is not clear that anyone other than Eriksson would have been a bidder. But, of course, that is not what happened. Rather, Eriksson followed Schall's advice and proceeded with the clandestine merger transaction.

The court finds that even though the approach that he took to solving his predicament was on the advice of his attorney, it nonetheless constituted a breach of fiduciary duty. The court, however, rejects Allison's contention that the appropriate relief is to simply undue the merger and presumably converted Eriksson's $1 million of equity investment into debt. First, Allison was a sophisticated corporate lawyer. He knew full well how to file a claim for preliminary injunctive relief, setting aside the merger before Eriksson invested significant cash in ATT in return for equity. Instead, he did not file this action until Eriksson had invested an additional $600,000 in the enterprise. While this case awaited trial for nearly three years, Eriksson invested another $400,000, without which ATT could not have continued in business. It is no longer possible to rescind the merger and return the parties to where they were in June, 2012.

Further, Allison apparently was prepared to allow ATT to default on its obligations and presumably liquidate or dissolve before he agreed to relent on his right to prohibit Eriksson from

[7] In its appraisal, Orchard Partners applied a 45% discount rate to future cash flow to calculate present value.

acquiring additional equity in ATT. On May 14, 2012, Allison sent an email to Eriksson advising him that the payroll administrator would attempt to charge ATT's bank account for Webber's wages the following day, and there would be insufficient funds in the account, so the charge would be rejected. Allison then asks Eriksson if he is going to fund the payment. He makes no offer to contribute anything himself.

Under these circumstances, the court finds that it would be inequitable to enter an order invalidating the merger and converting Eriksson's equity to some form of debt. Allison has offered no suggestions to the court for any alternative relief. Moreover, he offered no evidence from which the court could try to calculate some amount of monetary relief that might approximate Allison's alleged loss. This is not a case in which Allison has alleged, let alone offered evidence to prove, that the amount of equity in ATT Delaware that Eriksson received in return for his purchases of preferred shares was unfair. Indeed, the only evidence on that point offered at trial was the Orchard Partner's appraisal in which it concluded that if someone invested $620,000 in ATT, the enterprise would be worth $239,000, an immediate and substantial negative return on capital. Clearly, only someone like Eriksson who was committed to ATT's intellectual property because he invented it (or for some other reason had an idiosyncratic commitment to ATT's success) would make such an investment. *Compare Lynch v. Vickers Energy Corp.*, 429 A.2d. 497, 501-503 (Del. 1981) (monetary damages ordered where rescission is not feasible because of the passage of time and subsequent corporate events transpired, but evidence of the fair value of the stock acquired for an unfair price could be calculated).

The court finds no precedent to assist it in fashioning appropriate equitable relief. Nonetheless, it will try.

First, the court sees no reason why the rights that minority members of a Delaware limited liability company enjoy absent contractual agreement to do away with them ought not be restored. Allison and Eriksson had agreed to a form of those rights when they signed the ATT operating agreement. The court orders that Eriksson and the Eriksson Trust cause an amended and restated operating agreement for ATT Delaware to be prepared and made effective that rescinds and/or amends the existing operating agreement in the following manner: section 6.01 is rescinded and the members shall have such voting rights as are provided under Delaware law; section 6.04(a) shall be rescinded to the extent that it eliminates fiduciary obligations of members to one another and directors and officers to the company and its shareholders, rather, the members shall have those obligations provided by Delaware law; and section 7.01, first two sentences, shall be rescinded, and members shall have access to the books and records of the company as provided by Delaware law. Additionally, the amended and restated operating agreement shall include a provision requiring the Board of ATT Delaware, on reasonable notice, not more than three times annually, to report to Allison either orally or in writing on the business and affairs of the company. Allison shall also be timely advised of any anticipated extraordinary business events such as the sale of substantially all of the assets of ATT Delaware or an investment either in the form of debt or equity by an outside investor or other significant financial transaction. If ATT Delaware prepares annual financial statements, a copy shall be provided to Allison.

Further, Allison's (and/or the Allison Trust at Allison's discretion) percentage interest in the equity of the company shall be grossed up to 5% and shall not be subject to dilution, unless there is an investment by a bona fide outside investor and then such dilution shall be only on the same terms as the other holders of common or preferred shares in the company. Stated

differently, no further investment in ATT Delaware by any common or preferred shareholder existing at the time this judgment enters may reduce Allison's interest below 5%. Further, if ATT Delaware liquidates before any outside investor invests in ATT Delaware, Allison's 5% interest shall be treated pari passus with the preferred shareholders.

Allison still has claims against Karl Proppe and Gudrun Eriksson, as Trustees of the Eriksson Trust, for breach of fiduciary duty. While the Trust, as an equity holder in ATT, owed a fiduciary duty to Allison, it was only a minority owner. As noted above, Eriksson owned 55.5% of the ATT points in his own name and he did not require the Trust's participation to effect the merger; nor could the Trust stop the transaction. Its acquiescence in Eriksson's action did not constitute a breach of fiduciary duty and did not cause injury to Allison. Judgement shall enter dismissing the claims against the Trust asserted in Count I.

Breach of Contract

A breach of contract claim remains against Eriksson for breach of that provision of the Operating Agreement that states that the members are "under a duty to conduct the affairs of the Company in good faith." Section 5.03.C.[8] The court finds that this contractual obligation was breached by Eriksson when he caused ATT to retain Schall and engage him to merge ATT into ATT Delaware without any prior notice to Allison. However, there was no evidence that Allison suffered a loss as a result of that breach of contract. As noted above, there is no evidence that Eriksson did not pay fair value for the additional equity in ATT Delaware that he purchased. Further, there is convincing evidence that if Eriksson had not provided additional financing, ATT would have been unable to pay its current debts. There is no evidence of ATT's liquidation

[8] In the Decision, the court found that causing ATT to merge into ATT Delaware was not in itself a breach of the Operating Agreement, because the Operating Agreement was silent on the subject of mergers.

value, i.e., no evidence that a fire sale of its assets would have resulted in a distribution to Allison. Judgment shall therefore enter for Eriksson on the breach of contract claim.

Civil Conspiracy

A civil conspiracy claim against Eriksson and Proppe also remains in this case. See Count IV. Here the claim is based on that theory of conspiracy in which "a person may be liable in tort if he knows that the conduct of another person constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." *Kurker v. Hill*, 44 Mass. App. Ct. 184, 189 (1998) (internal quotations and citations omitted). "Key to this cause of action is a defendant's substantial assistance, with the knowledge that such assistance is contributing to a common tortious plan. In the tort field, the doctrine appears to be reserved for application for facts which manifest a common plan to commit a tortious act where the participants know of the plan and its purpose and take affirmative steps to encourage the achievement of the result." *Id.* Here, the tortious act is that of Eriksson, i.e., his breach of fiduciary duty to Allison. Conspiracy is not a second claim to be asserted against the primary actor, but derivative of the primary actor's tortious act in order to hold another person liable for it. Therefore, judgment must enter for Eriksson on Count IV.

With respect to Proppe, he never met with Schall prior to August, 2012, although he may have spoken with him once on the telephone. There is, however, no evidence concerning what was said in that call. The decision to merge ATT into ATT Delaware was reached by Eriksson and Schall, while Proppe was in Norway. After he returned, he had telephone conversations in which Eriksson convinced him that this was the best approach to save ATT, which was in need of an immediate cash infusion that only Eriksson was prepared to make, and he would only make it in return for additional equity in the company. Proppe did sign the documents necessary to

carry out the transaction in his capacity as Manager of ATT and the Manager of ATT Delaware. Clearly, that was substantial assistance; however, the court credits Proppe's testimony that he thought this was in the best interest of ATT and fair to Allison. He certainly was aware that this transaction would enable Eriksson to make an equity investment, but it is not clear that he was aware of all of the other changes in the Operating Agreement. Additionally, because Eriksson owned in his own name more that 50% of the points in ATT, he had the ability to effect the transaction without Proppe, by executing a written consent to appoint a new manager. In any event, as Manager of ATT his primary responsibility would be to insure that ATT could pay its debts. The court finds that Proppe did not engage in a civil conspiracy to cause a breach of Eriksson's fiduciary duty to Allison by signing the documents that permitted Schall to consummate the merger. Further, there is no relief that the court could enter against Proppe other than assisting in the amending the ATT Delaware agreement. It cannot order Proppe to give equity in ATT Delaware to Allison and there exists no basis for an award of monetary damages.

Judgment shall enter dismissing Count IV.

ORDER

For the foregoing reasons, Final Judgment shall enter as follows:

A. Under Count I, the court declares that Eriiksson has breached his fiduciary duty to Allison and orders that, as the majority shareholder in Applied Tissue Technologies, LLC, he cause that company to amend its operating agreement to achieve the following:

section 6.01 of the ATT Delaware Agreement to be rescinded and the members shall have such voting rights as are provided under Delaware law; section 6.04(a) shall be

rescinded to the extent that it eliminates fiduciary obligations of members to one another and directors and officers to the company and its shareholders, rather, the members shall have those obligations provided by Delaware law; and section 7.01, first two sentences, shall be rescinded, and members shall have access to the books and records of the company as provided by Delaware law. Additionally, the amended and restated operating agreement shall include a provision requiring the Board of ATT Delaware, on reasonable notice, not more than three times annually, to report to Allison either orally or in writing on the business and affairs of the company. Allison shall also be timely advised of any anticipated extraordinary business events such as the sale of substantially all of the assets of ATT Delaware or an investment either in the form of debt or equity by an outside investor or other significant financial transaction. If ATT Delaware prepares annual financial statements, a copy shall be provided to Allison.

Further, Allison's (and/or the Allison Trust at Allison's discretion) percentage interest in the equity of the company shall be grossed up to 5% and shall not be subject to dilution, unless there is an investment by a bona fide outside investor and then such dilution shall be only on the same terms as the other holders of common or preferred shares in the company. Stated differently, no further investment in ATT Delaware by any common or preferred shareholder existing at the time this judgment enters may reduce Allison's interest below 5%. Further, if ATT Delaware liquidates before any outside investor invests in ATT Delaware, Allison's 5% interest shall be treated pari passus with the preferred shareholders.

B. Judgment for the defendants dismissing all other counts and claims asserted in the complaint not previously dismissed pursuant to the order on the defendants' motion for summary judgment.

Mitchell H. Kaplan
Justice of the Superior Court

Dated: June 29, 2016

Commonwealth of Massachusetts

Suffolk, SS. Appeals Court
No. 2017-P-0126

W. Robert Allison
Plaintiff/Appellant

v.

Elof Eriksson & others
Defendants/Appellees

Certification

I certify that this brief complies with the relevant rules of court pertaining to the preparation and filing of briefs. Those rules include Mass. R. App. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. App. P. 16(e) (references to the record); Mass. R. App. P. 16(f) (reproduction of statutes, rules and regulations); Mass. R. App. P. 16(h) (length of briefs); Mass. R. App. P. 18 (appendix to the briefs); and Mass. R. App. P. 20 (form of briefs, appendices, and other papers).

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Commonwealth of Massachusetts

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Plaintiff/Appellant

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Defendants/Appellees

Certificate of Service

I certify that on April 27, 2017, I served the attached brief through the eFileMA system upon:

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